Supreme Court, U. S.
FILED
JUN 23 1978
, JR., CLERK

Supreme Court of the United States

October Term, 1977

No. 77-1710

NATIONAL WILDLIFE ART EXCHANGE, INC., AND RALPH H. STEWART,
Petitioners,

vs.

FRANKLIN MINT CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Third Circuit

ARTHUR H. SEIDEL
ROBERTA L. JACOBS
SEIDEL, GONDA & GOLDHAMMER, P.C.
600 Three Penn Center Plaza
Philadelphia, Penna. 19102
Counsel for Respondent

Of Counsel:
R. E. LAPORTE
Franklin Mint Corporation
Franklin Center, Penna. 19091

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17 U.S.C. §102(b)

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RELEVANT STATUTES

The Petition for a Writ of Certiorari contains at page 2 the provision of the Copyright Act of 1909, which relates to the subject case, 17 U.S.C. §101.

The relevant provision of the Copyright Act of 1976[1] which relates to the subject case is:

17 U.S.C. §102(b):

> In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principal or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work.

1. The Copyright Act of 1976 became effective January 1, 1978, subsequent to the trial of the case at bar which occurred in January 1977.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the findings of fact of the District Court for the Eastern District of Pennsylvania and the Court of Appeals for the Third Circuit, without dissent, that Albert Earl Gilbert (hereinafter "Gilbert") did not copy "Cardinals on Apple Blossom" in creating "The Cardinal" and that "The Cardinal" is not substantially similar to "Cardinals on Apple Blossom" are clearly erroneous.[2]

2. Whether this Court should disturb the findings of fact based on the credibility of Gilbert and of other witnesses observed by the District Judge during a nine-day bench trial.

2. Appended for the Court's information are color reproductions of the two works at issue and the work denominated "The New Cardinal". These reproductions more adequately depict the works than the black and white out-of-focus reproductions appended to the Petition For a Writ of Certiorari.

STATEMENT OF THE CASE

Gilbert is one of the foremost young ornithological artists (R 285, 1299-1300, 1437, 1458).[3]

Ornithological artists generally work in the same manner, from field sketches, specimens and photographs accumulated in the course of a career (R 275-276, 281, 840, 1301). They return to source material previously used for many reasons, including the need to present detail accurately, the need to compensate for seasonal and geographical absence of the subject in nature (R 282-283, 843-845, 851, 889-890, 1314-1315); and the need to return to themes not fully explored or not developed in a satisfactory manner (R 282-283, 285).

Ornithological art follows certain conventions (R 327-328, 1305, 1458). Among these are ornithological accuracy, portrayal of the subject in a characteristic setting and pose, and the representation of individuals of different ages or sexes to show differences within a single species (R 135-136, 321-322, 850). By way of example, because birds are symmetrical on each side, they are normally portrayed in profile except for owls, which are normally portrayed full face (R 307, 848-849, 1307, 1332-1333). These conventions apply to decorative as well as to illustrative works (R 385, 859-860, 1171).

Adoption of a characteristic or conventional pose will give very different works of art a superficial similarity without copying or improper appropriation (R 1332-1334, 1336-1338).

There are only a limited number of ways in which one can portray passerines, such as the cardinal (R 325-327). A cardinal accurately portrayed will of necessity closely resemble any other similarly positioned cardinal accurately portrayed.

3. Citations preceded by "R" are citations to the Appendices filed in Appeal Nos. 77-1525; 1526; and 1527.

Gilbert created "Cardinals on Apple Blossom" from a series of field sketches, slides and stuffed specimens developed into working sketches (R 1101-1119). He created "The Cardinal" using some of this source material, and further working sketches, photographs, and slides taken subsequent to completion of "Cardinals on Apple Blossom" (R 1101-1153, 1181, 1203, 1245-1261).

"The Cardinal" is not a copy of "Cardinals on Apple Blossom", but a variation of the same theme. Artists, including ornithological artists, often create variations of themes they have treated previously (R 1311-1312, 1317-1319, 1324-1328, 1457). Such variations are not copies but new, independent expressions about the same subject. As ornithological artist Eckelberry stated:

> ". . . The intent is to make a variation on a theme. The intent is not to duplicate or replicate, the intent is to somehow adjust the elements to a more satisfactory conclusion." (R 287)

The statement of the case submitted on behalf of National Wildlife Art Exchange, Inc. (hereinafter "National") and Ralph H. Stewart (hereinafter "Stewart") not only ignores these salient facts but contains numerous misstatements of the record of varying degrees of importance.[4] For example, it is alleged at page 4 of the Petition for a Writ of Certiorari (hereinafter "the Petition") that Franklin Mint Corporation (hereinafter "Franklin") was shown only a print of National's painting for "The Cardinal". No citation to the record supports this statement because there is no statement in the record which supports the statement. On the contrary, the record refutes the statement. Franklin was initially shown "Cardinals on Apple Blossom" in addition to many other works of Gilbert at

4. Undoubtedly, the reason why National and Steward did not comply with Rule 40 of this Court, and cite to the record, was to hinder the ready exposure of such misstatements.

the time Gilbert entered into a contractual relationship with Franklin (R 649). At the time Gilbert was creating "The Cardinal", Franklin was shown not "Cardinals on Apple Blossom", but a watercolor painting prepared by Gilbert specifically for use by Yves Beaujard, the engraver assigned by Franklin to work with Gilbert on "The Cardinal" and other works, and possibly a small pencil sketch designed to show the compositional relationship between "The Cardinal" and "The Blue Jay" (R 674-677).[5]

5. In similar fashion, the Petition misstates Gilbert's technique in the creation of "The Cardinal". Page 5 of the Petition asserts that there was no final working sketch for "The Cardinal", the implication being that Gilbert used the final working sketch from "Cardinals on Apple Blossom" for that purpose. However, as Gilbert testified, there were two final working sketches for "The Cardinal" created specifically for "The Cardinal" from material previously collected and created by Gilbert, and from new sketches, photographs and slides taken subsequent to the completion of "Cardinals on Apple Blossom" (R 1103-1153, 1181, 1203).

The opinion of the District Court as well as the record is misrepresented in the Petition. Page 5 of the Petition asserts that the District Court did not pass on the question of substantial similarity to an ordinary lay observer. To the contrary, the District Judge, himself an ordinary lay observer, found:

> "I am of the opinion that, although there are similarities between 'Cardinals on Apple Blossom' and 'The Cardinal', the latter is a variation on a theme found in nature and is not a copy of the former. The absence of the large yellow butterfly in 'The Cardinal' negates any striking similarity." (A 31)

Page 6 of the Petition asserts that a cardinal painting by Ruthven is "the closest cardinal painting by other artists". Whether one of 22 reproductions of cardinals is more like "Cardinals on Apple Blossom" than "The Cardinal" is irrelevant to the question at issue, whether Gilbert copied "Cardinals on Apple Blossom" to create "The Cardinal" and whether "The Cardinal" is substantially similar to "Cardinals on Apple Blossom" in expression. However, there were introduced into evidence depictions of cardinals bearing far closer similarity to "The Cardinal" and "Cardinals on Apple Blossom", than Ruthven's painting. See, particularly, the works of O'Neill, FX 471 at R 1350 and Gronner, FX 82 at R 1346. Similarities among paintings of cardinals are to be expected, because cardinals are living creatures which closely resemble each other.

SUMMARY OF ARGUMENT

Whether Gilbert copied "Cardinals on Apple Blossom" to create "The Cardinal" is a pure question of fact.

This fact question was resolved in the negative by the District Court after a nine-day bench trial (Finding 54 at A22[6]). The District Court, in finding that Gilbert had not copied "Cardinals on Apple Blossom" had the opportunity to listen to and question the witnesses presented by the parties and found Gilbert's testimony to be credible (A 31-32).[7]

The Court of Appeals, on review, without dissent, concluded that the District Court did not err in finding that there was no copying (A 12).

Whether "The Cardinal" is substantially similar to "Cardinals on Apple Blossom" is also a pure question of fact.

This fact question of substantial similarity was resolved in favor of Gilbert and Franklin by both the District Court and the Court of Appeals (A 31, 12).

There is here no dispute as to the relevant legal principles to be applied. There is no dispute that, to prevail on a claim of copyright infringement, the plaintiff must first establish copying and then substantial similarity (A 10), *Rosen v. Loew's*, 162 F.2d 785, 788 (2d Cir., 1947); *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir. 1975), cert. denied sub nom. *Universal Athletic Sales Co. v. Pinchock*, 423 U.S. 863 (1975). Since ideas, concepts or themes are not subject to copyright protection, *Mazer v. Stein*, 347 U.S. 201, 217-218 (1954); 17 U.S.C. 102(b), the substantial similarity must be in the expression of such ideas, concepts or themes.

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6. Citations preceded by "A" are citations to the Appendix to the Petition.

7. The Court of Appeals rightly noted that "credibility determinations are uniquely the province of the fact-finder". (A 12).

ARGUMENT — REASONS FOR DENYING THE WRIT

F.R.C.P. 52(a) provides that "findings of fact shall not be set aside unless clearly erroneous . . .".

This Court follows the "clearly erroneous" requirement, *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-342 (1949); *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 122-123 (1969).

Also, only in an exceptional case will this Court set aside findings when made, as here, by a District Court, and examined and accepted by a unanimous Court of Appeals, *Goodyear Tire & Rubber Co., Inc. v. Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944); *Neil v. Biggers*, 409 U.S. 188, 202 (1972).

The District Court found as facts that Gilbert's "The Cardinal" was not copied from "Cardinals on Apple Blossom" and that there was no such similarity between the works as would rise to the level of improper appropriation (Findings 51 and 54 at A 21, 22), and so concluded as a matter of law (A 35) that there was no copyright infringement. The Court of Appeals affirmed unanimously, finding there was substantial evidence to support the District Court's determination (A 6, 10-12).

In addition, the Court of Appeals made its own independent factual finding based on its observations and impressions after seeing "Cardinals on Apple Blossom" and "The Cardinal" in open court, A 12-13:

> ". . . we conclude that the District Court did not err in finding that there was no copying.
>
> Even if it be assumed that the Trial Court's finding was based only on an application of a mechanical standard of copying — a tracing concept — without consideration of the appropriation factor, we would affirm. We have examined the two paintings and based upon our own observations and impressions, we conclude that while the ideas are similar, the expressions are not. A pattern of

differences is sufficient to establish a diversity of expression rather than only an echo. . . . The similarities here are of a nature not calculated to discourage an artist in the development of a specialty yet sufficiently distinguishable to protect his creativity in that sphere. Just as Justice Holmes would not ban the ballerinas of Degas, we may not excommunicate the cardinals." [Citations omitted]

The decision of the District Court affirmed by the Court of Appeals is in accord with well-established precedent insofar as legal standards are involved. *Esquire v. Varga Enterprises*, 81 F.Supp. 306 (N.D. Ill., 1948), affirmed on this point, 185 F.2d 14 (7th Cir., 1950); *Williams v. Kaag Manufacturers, Inc.*, 338 F.2d 949 (9th Cir., 1964); *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904 (3d Cir., 1975), cert. denied, 423 U.S. 863 (1975).

At pages 7 and 8 of the Petition, reference is made to the Copyright Act of 1976 and there is some implication that the decisions below are somehow not in accord with that Act.

The decisions below, however, are wholly in accord with past precedent as embodied in 17 U.S.C. §102(b) which provides that no copyright protection may be secured for an idea or theme, *Baker v. Selden*, 101 U.S. 99, 102-103 (1879). Thus, portraying a male and female cardinal according to certain established artistic conventions is an idea, concept or theme. Any artist may create one or more variations of that theme without infringing on any copyright in prior depictions of that theme so long as those variations comprise different expressions of the theme, as in the instant matter (R 221-223, 857-881, 1015-1016, 1020-1021, 1036-1041, 1145-1151, 1272-1277, 1340-1345).

It is argued at page 8 of the Petition that there is a conflict in the Circuits. There is no such conflict in law. *Gross v. Seligman*, 212 F. 930 (2d Cir., 1914) is distinguishable from this matter, from *Esquire v. Varga Enterprises, supra.*, and from *Williams v. Kaag Manufacturers, Inc., supra.*, on its facts. *Gross*, as opposed to these other decisions, involved photography, and no significant difference in expression was found, no variation on the theme of the earlier work.

In sum, what is at issue herein is a question of fact. It has been found by two courts as a fact that Gilbert did not copy "Cardinals on Apple Blossom" to create "The Cardinal", so that there can be no infringement of copyright, *Mazer v. Stein*, 347 U.S. 201, 218 (1954); *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 103 (2d Cir., 1951); and that "The Cardinal" is not substantially similar in expression to "Cardinals on Apple Blossom". Both findings are amply supported by the voluminous record herein.

There is no conflict of law between the Second, Third, Seventh and Ninth Circuits nor is there involved here any important question of law which has not been but should be settled by the Supreme Court. There is no doubt but that the same legal principles apply irrespective of the identity of the creator of the works in issue.

Because of the factual nature of the issues herein, and because each question of copyright infringement must be decided on its facts, there is no question of great public interest to the art or publishing worlds.

CONCLUSION

Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ARTHUR H. SEIDEL
Seidel, Gonda & Goldhammer, P.C.
600 Three Penn Center Plaza
Philadelphia, Penna. 19102
215-568-8383
Counsel for Respondent,
Franklin Mint Corporation

Of Counsel:
R. E. LAPORTE
Franklin Mint Corporation
Franklin Center, Pa. 19091

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 1978 three copies of the Brief in Opposition to Petition for a Writ of Certiorari were served by First Class Mail on William C. McCoy, Jr., Esquire, 625 National City Bank Building, Cleveland, Ohio 44114, counsel for Petitioners. I further certify that all parties required to be served have been served.

ARTHUR SEIDEL

Ornithological artist Don R. Eckelberry explained why the cardinal or any other bird of one artist inevitably looks similar to birds of the same species he has depicted:

> " . . . The difference between a wave and a Puffin is considerable. I mean, a wave is a formless thing. It changes its shape constantly, but a Puffin, that's it.
>
> Q. So with a Puffin one must reproduce what is in nature exactly?
>
> A. You don't have the flexibility. You see, a wave is a formless thing. You can do things with it; a sky, a lake, a pond, anything like that. You can have it any color, you can have it calm, you can do anything, but you can't change the color of the Puffin, you can't change the shape of a Puffin, you can't change his flight habit, you can't change a thing about the Puffin if you're really trying to paint a Puffin; it's as simple as that." (R 321-322)



"Cardinals on Apple Blossom" — FX 1

"After hearing extensive testimony and viewing Gilbert's rendition of a cardinal painted in the courtroom during the trial, the district judge found that the artist had not copied 'Cardinals on Apple Blossom' when he painted 'The Cardinal'." (A 6)



"The Cardinal" — FX 2

"The district court had the opportunity to hear the testimony from the artist and found credible his statement that he did not copy. For further support, Gilbert painted a third picture, 'The Cardinal' while in the courtroom and without referring to either of his earlier paintings. The court determined that although some of the same source materials were used in all three paintings, similarity between the works necessarily reflected the common theme or subject and each painting was a separate artistic effort." (A 11)



"The New Cardinal" — FX 547